OMEGA HOLDINGS BHD

v.

DATO' TIAH THEE KIAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-1829-1999]
27 MARCH 2002

CIVIL PROCEDURE: *Striking out - Statement of claim - Whether there were triable issues - Whether claim obviously unsustainable - Affidavit evidence - Whether admissible - Rules of the High Court 1980, O. 15 r. 6(2)(a), O. 18 r. 19(a), (b), (c), (d), O. 41 r. 5(2)*

These were the defendants' appeals against the decision of the learned senior assistant registrar dismissing their application under O. 18 r. 19(a) to (d) and O. 15 r. 6(2)(a) of the Rules of the High Court 1980 to strike out the plaintiff's statement of claim. The plaintiff had claimed that the first defendant had breached his fiduciary duty as its director, and that the sixth defendant had committed a breach of trust as a constructive trustee. The first defendant alleged that he was never a director of the plaintiff or its subsidiary company, Omega Securities; the sixth defendant averred that it had merely conducted the share transactions in its capacity as a stockbroker in the ordinary course of business. They both contended that the plaintiff's documents exhibited in its affidavit in reply were inadmissible hearsay.

Held:

[1] It was not appropriate to summarily strike out the plaintiff's claim because the very question of whether the first defendant was a shadow director of the plaintiff and Omega Securities (as contended by the plaintiff), was a question to be tried and determined through a discovery process or cross-examination of the witnesses. Further, as there were serious allegations of conspiracy against the first defendant, the summary process of terminating the plaintiff's claim upon affidavit evidence would be inappropriate without the advantage of oral evidence, cross-examination, discovery and interrogatories. Clearly, the plaintiff's claim was not obviously unsustainable. (pp 128 h & 129 c, h)

[2] The facts and matters deposed by the deponent in the plaintiff's first affidavit (encl. 35) were within his knowledge and belief and/or from the records which he, *ex officio*, had access to; he had clearly indicated that the source of the information was the plaintiff's records. Thus, encl. 35 did not contravene O. 41 r. 5(2) of the RHC and it was a legally admissible and competent document. (p 130 c)

[3] There were certain undisputed facts in this case that supported the plaintiff's pleaded case against the sixth defendant. Furthermore, the plaintiff's action against the sixth defendant was also premised upon conspiracy, whereby it was alleged that the sixth defendant together with the other defendants unlawfully conspired with the predominant purpose of causing loss to the plaintiff and Omega Securities by unlawful means. (p 131 c-e)

[Appeals dismissed.]

Case(s) referred to:

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & Ors [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218 ***(refd)***

Re A Company (no 005009 of 1987) ex p Copp & Anor [1989] Ch D BCLC 13 ***(foll)***

Selangor United Rubber Estates Ltd v. Cradock [1968] 1 WLR 1555 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4, 67

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d), O. 15 r. 6(2)(a), O. 41 r. 5(2)

Securities Industry Act 1983, ss. 87A, 122C

Other source(s) referred to:

Walter Woon, *Company Law Book*, 2nd edn, pp 222, 223

Loh Siew Chang, *Corporate Powers, Controls Remedies and Decision-Making*, 1999, p 208

For the appellants/1st & 6th defendants - Tan Hock Chuan (YL Chong); M/s Tan Hock Chuan & Co

For the respondent/plaintiff - A Vishnu Kumar; M/s Sri Ram & Co

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

The 1st and 6th defendants made two similar appeals to me *vide* encls. 71 and 72 respectively against the learned senior assistant registrar's decision on 9 February 2001 dismissing their application under O. 18 r. 19(1)(a) to (d) and O. 15 r. 6(2)(a) of the Rules of the High Court 1980 ('RHC') for the following orders:

(a) to strike out all the paragraphs in the plaintiff's amended statement of claim dated 30 June 1999 which refer or relate to the 1st and 6th defendants; and

(b) that the 1st and 6th defendants cease to be defendants in the suit.

Against The 1st Defendant

The plaintiff sued its former director, the 1st defendant, for breach of fiduciary duty owed by the 1st defendant to the plaintiff as a director of the plaintiff.

Against The 6th Defendant

The plaintiff sued the 6th defendant for, *inter alia*, conspiracy and breach of trust as a constructive trustee.

In short, against the 1st and 6th defendants the plaintiff alleged that by the fraudulent and dishonest actions of the 1st and 6th defendants, in breach of trust and fiduciary duties to the plaintiff, the 1st and 6th defendants caused the plaintiff's subsidiary company, Omega Securities Sdn Bhd ('Omega Securities') to give financial assistance to one John Soh Chee Wen ('John Soh') to purchase the plaintiff's shares ('Omega shares') which in turn caused Omega Securities to run foul of s. 67 of the Companies Act 1965.

To strike out the plaintiff's claim the 1st defendant raised the following grounds:

(a) the 1st defendant was never a shareholder of the plaintiff;

(b) the 1st defendant was never a director of the plaintiff or its subsidiary company, Omega Securities; and

(c) the plaintiff's documents exhibited in its affidavit in reply are inadmissible hearsay.

And, the 6th defendant raised the following grounds:

(a) the 6th defendant merely conducted the share transactions in its capacity as a stockbroker in the ordinary course of business; and

(b) the plaintiff's documents exhibited in its affidavit in reply are inadmissible hearsay.

The 1st defendant's ground (c) is common with the 6th defendant's ground (b).

On Grounds (a) And (b) Of The 1st Defendant's Appeal

The lynchpin of the 1st defendant's contention on grounds (a) and (b) is that since the 1st defendant, Tony Tiah, was never a shareholder of the plaintiff and never a director of the plaintiff and Omega Securities, the plaintiff's claim against him should be struck off. It is undisputed that the 1st defendant's name does not appear in the company statutory forms of the plaintiff company and Omega Securities as a director or shareholder.

Upon study of the pleadings and affidavits I am satisfied that the court cannot strike out the claim against the 1st defendant for being clearly without merits. Notably, the statement of claim contains averments that the 1st defendant is a shadow director of the plaintiff and Omega Securities who had represented and held out that he had control of over 90% of the plaintiff's shareholding. Indeed, there is a pending criminal case against the 1st defendant, Tony Tiah, based upon the same transaction in this suit.

The material part of the plaintiff's averments in this regard is as follows:

> The plaintiff is a public company. The plaintiff's main business is its 100% wholly owned subsidiary, Omega Securities Sdn Bhd ('Omega Securites'). Omega Securities was a licensed stockbroker and its main business is dealing with shares. The 1st defendant ('Tony Tiah') is an individual and a stockbroker. At all material times, Tony Tiah represented and held out that he had control over 90% of the plaintiff's shares ('Omega shares'). He was also a director of the plaintiff and Omega Securities within the meaning of the term "director" as defined in section 4 of the Companies Act 1965 ('the Act'), that is, a shadow director. The other directors of these 2 companies, that is, the 2nd till the 5th defendants were accustomed to act in accordance with the directions and instructions of Tony Tiah.

The ambit of s. 4 includes shadow directors, and this has been succinctly explained by the learned author Walter Woon in his *Company Law Book*, 2nd edn at p. 222:

> Finally there is the 'shadow director'. This rather sinister individual is an actuality a puppeteer. He pulls the strings and his puppets on the board dance. A shadow director is considered to be a director too because s. 4(1) of the Companies Act defines the terms 'director' to include 'a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act … .

and at p. 223:

> Millet J explained in *Re Hydrodam (Corby Ltd*: … A shadow director by contrast does not claim to purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims are the only directors of the company to the exclusion of himself … .

As such, in my view it is inappropriate to summarily strike out the plaintiff's claim because the very question of whether the 1st defendant is a shadow director is a question to be tried. The following passage in *Corporate Powers, Controls Remedies and Decision-Making* by Loh Siew Chang, 1999 (at p. 208) is of assistance in determining this question:

> … the case of *Re a Company (no. 005009 of 1987) ex parte Copp and Anor* [1989] Ch. D BCLC 13. In that case, the company was in financial difficulties and was indebted to a bank. The bank carried out an investigation into the financial affairs of the company and a report was prepared. The report showed that the company was indeed facing financial difficulties. The report also recommended various steps to be taken and the directors of the company implemented the recommendations and in the interim period, securities were taken by the bank. Knox J refused to strike out the action against the bank holding that there were questions to be tried as to whether the bank was indeed a shadow director.

It was in *Re a Company (no. 005009 of 1987) ex parte Copp and Anor* [1989] Ch. D BCLC 13 that Justice Knox held (at pp. 20 and 21) that a striking out application is not applicable to determine whether a person is a shadow director. That process could only be determined through discovery process or cross-examination of the witness.

It was also alleged that the 1st defendant breached his fiduciary duties to the plaintiff and Omega Securities by fraudulently implementing an elaborate scheme which caused Omega Securities to give financial assistance to John Soh to purchase the plaintiff's shares (Omega shares) and ran foul of section 67 of the Act. And, that the ultimate objective achieved by the 1st and 6th defendants (together with the other defendants in this suit), was that John Soh acquired 90% of the plaintiff's shareholding (Omega shares) through the implementation of an elaborate scheme, whereby John Soh was in a position to unlawfully acquire Omega shares ('the scheme'). The particulars of the scheme was condescended upon in great detail.

In paras. 4.2.1 to 4.4.6(xiii) of the amended statement of claim the plaintiff alleged that the 1st and 6th defendants caused Omega Securities to lose its business of trading in securities and was thereby unable to generate income because of the revocation of Omega Securities stockbroking licence by the Securities Commission. And, that this had crippled the plaintiff because it lost its core business and investment, that is, its subsidiary company (Omega Securities), as Omega Securities was no longer able to generate any revenue for the plaintiff.

Further, as there are serious allegations of conspiracy against the 1st defendant, the summary process of terminating the plaintiff's claim upon affidavit evidence is inappropriate without the advantage of oral evidence, cross-examination, discovery and interrogatories. Clearly the plaintiff's claim is not obviously unsustainable (see *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & Ors* [1990] 2 CLJ 402; [1990] 2 CLJ (Rep) 218).

On ground (c), the complaint is that since the deponent of the plaintiff's 1st affidavit (encl. 35) Peter Chen was never a director when the cause of action occurred or arose (that is November 1997) he had no personal knowledge of its contents; nor was he the maker of those documents exhibited in his affidavit. It is expressly provided under O. 41 r. 5(2) of the RHC that affidavit was sworn for the purpose of an interlocutory application may contain statements of information or belief with the sources and grounds thereof. Here, Peter Chen has already deposed in the plaintiff's 1st affidavit that the facts and matters which are deposed in his affidavit are within his knowledge and belief and/or from the records which he, *ex officio*, had access to; and he had clearly indicated that the source of the information was the records of the plaintiff. Thus, I would hold that encl. 35 does not run foul of O. 41 r. 5(2) of the RHC and it is a legally admissible and competent document for the current purposes.

The crux of the 6th defendant's submission on its ground (a) is that since the 6th defendant merely sold Omega shares on behalf of its clients in the ordinary course of business, the plaintiff's claim against the 6th defendant should be struck off. To counter this the plaintiff referred to the documents, surrounding circumstances and the pending criminal case against the manager of the 6th defendant, Kimmie Khoo, which is based upon the same transaction in this suit. I note that detailed particulars of conspiracy was also pleaded and set out as follows:

> (a) At all material times, 1st defendant, Tony Tiah, had control over TA Enterprise Bhd ('TA Enterprise') a public company incorporated in Malaysia. TA Enterprise shares are listed, quoted and traded on the Kuala Lumpur Stock Exchange ('KLSE'). The 6th defendant is a licensed stockbroker and is controlled by the 1st defendant, Tony Tiah through TA Enterprise.
>
> (b) The 1st defendant caused and procured the Omega shares to be placed with the 6th defendant, which the 6th defendant was well aware of and had knowledge of the objective of the scheme.
>
> (c) By having the plaintiff's shares (Omega shares) and knowledge of the scheme, the 6th defendant knowingly assisted, fraudulently and with dishonest design, and in breach of trust to plaintiff as a constructive trustee sold the plaintiff's shares (Omega shares), which caused Omega Securities to give financial assistance to John Soh to purchase the Omega shares, in violation of section 67 of the Act.

On the law on stranger's liability as constructive trustee, the following *dicta* in *Selangor United Rubber Estates Ltd v. Cradock* [1968] 1 WLR 1555 CA, at p. 1580, is illuminating:

> But on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal power … unless those agents receive and become chargeable with some part of the trust property or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. …
>
> It is this information in *Barnes v. Addy* "assist with knowledge in a dishonest and fraudulent design on the part of the trustee" that is the basis of the plaintiff's claim that defendants are liable as constructive trustees. There are these three elements: (1) assistance by the stranger, (2) with knowledge, (3) in a dishonest and fraudulent design on the part of the trustees.

In support of the plaintiff's pleaded case, the following are noted:

(a) It is undisputed that Kimmie Khoo is the general manager of the 6th defendant and therefore an employee of the 6th defendant, and that the 1st defendant controls the 6th defendant.

(b) Kimmie Khoo who is the personal assistant of the 1st defendant was also charged under s. 87A read together with s. 122C of the SIA, as having abetted John Soh to defraud Omega Securities.

The plaintiff's action against the 6th defendant is also premised upon conspiracy, whereby it was alleged that the 6th defendant together with the other defendants unlawfully conspired with the predominant purpose of causing loss to the plaintiff and Omega Securities by unlawful means. And, I note that detailed particulars of this were also set out in paras. 4.2 to 4.4.6 of encl. 2.

For all the above reasons, I did not find this to be a fit and proper case for striking out of any of the averments in the amended statement of claim or dismissal of the claim against the 1st and 6th defendants and I dismissed both the appeals *vide* encls. 71 and 72 with costs.